Office-Supreme Court, U. S.
FILED
AUG 9 1951
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 230

BESSER MANUFACTURING COMPANY AND JESSE H. BESSER,

Appellants,

vs.

THE UNITED STATES OF AMERICA

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

STATEMENT AS TO JURISDICTION

CARL R. HENRY,
JOHN W. BABCOCK,
Counsel for Appellants.

INDEX

Subject Index

	Page
Statement as to jurisdiction	1
Jurisdiction	1
Dates of judgment and application for appeal	2
Statute involved	2
Nature of the case and rulings below	3
The questions are substantial	15
The findings and conclusions that petitioners violated the Sherman Act	15
The punitive nature of the judgment entered	18
The improper delegation of judicial function to a lay royalty "committee"	20
Appendix "A"—Opinion of the United States District Court	22
Appendix "B"—Final judgment of the United States District Court	41

Table of Cases Cited

Andrus v. *Whitman*, 93 F. Supp. 383	17
Aspinwall Manufacturing Co. v. *Gill*, 32 Fed. 697, 140 U. S. 699	16
Bement v. *National Harrow Co.*, 186 U. S. 70	16
Crown Co. v. *Nye Tool Works*, 261 U. S. 24	19
Flexner Co. v. *Faussner Co.*, 145 F. (2d) 528	16
Hartford-Empire Co. v. *U. S.*, 323 U. S. 386	2, 18, 19
Standard Oil Co. v. *U. S.*, 283 U. S. 163	16
Transwrap Corp. v. *Stokes Co.*, 329 U. S. 637	16
United States v. *Bausch & Lomb Co.*, 321 U. S. 707	2
United States v. *General Electric Co.*, 272 U. S. 476	16
United States v. *National Lead Co.*, 332 U. S. 319	2
United States v. *United States Gypsum Co.*, 340 U. S. 76	20

STATUTES CITED

	Page
Expediting Act of February 11, 1903, as amended (32 Stat. 823; 36 Stat. 1167; 58 Stat. 272; 62 Stat. 989; 15 U. S. C. 29)	2
Judicial Code, Section 2101(b) (62 Stat. 962; 28 U.S.C. 2101b)	2
Sherman Act, Sections 1, 2 and 4 (Act of July 2, 1890, c. 647; 26 Stat. 209; 15 U.S.C. 1, 2, and 4)	2, 3

UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF MICHIGAN,
SOUTHERN DIVISION

Civil Action No. 8144

UNITED STATES OF AMERICA,

Plaintiff,

against

BESSER MANUFACTURING COMPANY, STEARNS MANUFACTURING COMPANY, INC., JESSE H. BESSER, LOUIS GELBMAN AND HAMLIN F. ANDRUS,

Defendants

JURISDICTIONAL STATEMENT

Pursuant to Rule 12 of the Rules of the Supreme Court of the United States, petitioners Besser Manufacturing Company and Jesse H. Besser, two of the defendants in the above entitled action, respectfully present the following statement disclosing the basis upon which the Supreme Court of the United States has jurisdiction upon appeal to review the final judgment herein, dated April 12, 1951.

Jurisdiction

This is an appeal from a final judgment of the District Court of the United States for the Eastern District of Michigan, Southern Division, in an action in which the United States as complainant, under Section 4 of the

Sherman Act, sought and obtained relief against Besser Manufacturing Company, Jesse H. Besser and others in respect of acts and agreements found to constitute a violation of sections 1 and 2 of the said Act (Act of July 2, 1890, c. 647, sections 1, 2, and 4, 26 Stat. 209; 15 U. S. A. C. §§ 1, 2, 4). Jurisdiction to review by direct appeal the final judgment entered in this action is conferred by section 2 of the Expediting Act of February 11, 1903, as amended (32 Stat. 823; 36 Stat. 1167; 58 Stat. 272; 62 Stat. 989; 15 U.S.C. § 29), and section 2101(b) of the Judicial Code [62 Stat. 962; 28 U.S.C. § 2101(b)].

The following decisions, among others, sustain the jurisdiction of the Supreme Court to review the final judgment in this action on direct appeal: *United States* v. *National Lead Co.*, 332 U. S. 319 (1947); *Hartford-Empire Co., et al.* v. *United States*, 323 U. S. 386 (1945); *United States* v. *Bausch & Lomb Co.*, 321 U. S. 707 (1944).

Dates of Judgment and Application for Appeal

The final judgment sought to be reviewed was entered on April 12, 1951.

The petition for appeal is presented to the District Court herewith on June 6, 1951.

Statute Involved

The statutory provisions involved are Sections 1, 2, and 4 of the Sherman Anti-Trust Act, as amended (26 Stat. 209; 50 Stat. 693; 15 U. S. C. §§ 1, 2, 4). The pertinent provisions thereof are as follows:

> "§ 1. *Trusts, etc., in restraint of trade illegal; exception of resale price agreements penalty*
>
> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: . . ."

"§ 2. *Monopolizing trade a misdemeanor; penalty*

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

"§ 4. *Jurisdiction of courts; duty of district attorneys; procedure*

The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1-7 of this title; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises."

Nature of the Case and Rulings Below

The complaint, filed April 28, 1949, charged defendants Besser Manufacturing Company, Jesse H. Besser, Stearns Manufacturing Company, Inc., Louis Gelbman, and Hamlin F. Andrus (hereafter respectively called Besser Co., Besser, Stearns, Gelbman, and Andrus) with violations of sections 1 and 2 of the Sherman Act (26 Stat. 209; 15 U. S. C. §§ 1 and 2). The general charges were that Besser Co. and

Besser had attempted to monopolize, and had monopolized, interstate trade and commerce in concrete block making machinery; and that since 1942 the five defendants had been engaged in a combination and conspiracy to restrain such commerce.

Concrete block making machines are sold or leased by their manufacturers to local businesses, which employ them in the production of concrete blocks used for various building purposes. Certain overall figures are undisputed, though there is controversy as to the inferences to be drawn from them. In 1948 concrete block machines were produced and sold or leased by not less than 42 manufacturers. The machines sold or leased by these manufacturers had a total annual production capacity of 628,000,000 standard concrete blocks. Of this aggregate, the production capacity of the machines sold or leased by Besser Co. was 119,000,000 blocks, or 19%; of Stearns, 77,000,000 blocks, or 12.3% and of other manufacturers, 432,000,000 blocks, or 68.7%.

The dollar value of machines sold or leased by a manufacturer, however, is not necessarily proportional to the productive capacity of such machines. Thus, in 1948, the dollar value of machines sold or leased by Besser Co. was 52.1% of the aggregate dollar value of the industry; by Stearns 12.9%; and by other manufacturers, 35%.

Besser Co., a Michigan corporation, was founded in 1897 by Mr. Herman Besser, father of defendant Jesse H. Besser, as a wood stave and shingle mill. In 1904 it entered the manufacture of concrete block making machinery, and by 1905 its former stave and shingle operations had been discontinued. Mr. Herman Besser continued active in the company until 1925; Mr. Jesse Besser began working with the company as a boy after school, and has devoted to the company his entire business career of nearly

fifty years. He and his wife today own all the stock of the company.

Pioneers in the industry, the Bessers, father and son, through their business and inventive efforts, have been largely instrumental in the technological development of the concrete block making process. The first Besser machine, produced over 45 years ago. was an entirely hand operated, "cored" pallet [1] machine consisting of a mold with collapsible sides and cores which were withdrawn through the bottom of the mold. The mold box was hand charged by shovel, the mixture was tamped down into the mold by hand, and the block within the core was removed by hand. This manual operation produced some 150 to 200 blocks per 8-hour day. In 1909 the Bessers developed a power tamper to work above the hand machine, the first marked improvement in the process, which trebled the output capacity. In 1914 the Bessers developed a machine in which the tamping and the core removal were power operated, though the feeding and the opening and closing of the mold were still by hand. This improved machine produced some 1800 blocks per day. In 1919 they perfected a machine of similar design which produced two blocks at a time, thus stepping up productive capacity with a six man crew to some 3000 blocks per day.

In 1924 Jesse H. Besser invented the so-called "plain" pallet stripper process which in essence eliminated the metal core and permitted the delivery of the block directly from the mold without involving the extra step of utilizing a core. Employing this development, on which a patent was issued to Mr. Besser in 1929, machines were manu-

[1] The term "cored" pallet is descriptive of a concrete block making machine in which a metal core is placed inside the mold, and the block is cast within this core. The core, while the mixture is still wet, is removed from the mold. Subsequently, after the block has set, the core is removed from the block.

factured which, with a four man crew, could produce 3000 to 3600 blocks daily. All of the foregoing machines used tamping to compact the mixture in the mold. In 1939 Besser Co. began the production of Vibrapac machines, which used vibration of the mold, instead of tamping, to compact the mixture. Today, in areas of sufficient population concentration to absorb volume production, fully automatic machines making three blocks at a time can produce 6000 blocks per eight-hour shift with a two man crew.

Other patents related to concrete block making machinery have been issued to various inventors, of which several are mentioned in the record in this case. During the 1930s, Gelbman and Andrus evolved, and in 1939 patented, certain developments providing for a movable feed box which poured the mixture into a vibrating mold, where pressure was applied during vibration. In 1938, one Scott secured a patent providing for the packing of the mixture in the mold by vibration of the mold separate from the machine, and, thereafter, one Wellnitz patented a device for controlling the height and density of the concrete block. Besser Co. owns the Scott and the Wellnitz patents, the latter having been purchased shortly before the trial in 1950. There is no allegation, and no evidence, that there was any impropriety in the acquisition of these patents by Besser Co.

About 1934, Stearns, headed by one Eugene F. Olsen, started to produce concrete block making machines, and in 1936, Stearns obtained an exclusive license under certain Gelbman-Andrus patents and began the manufacture thereunder of high production vibrating machines. In 1940, Gelbman, Andrus, and Stearns sued a user of a Besser machine for infringement. Besser Co. defended this action and the trial court found for the defendant. While an appeal was pending, Gelbman, Andrus, Stearns and Besser Co. entered into a license agreement dated December 7, 1942, which presents one of the important issues in this case. In

part this license agreement was in settlement of the patent litigation; and in part it was intended to secure the wider exploitation of certain Gelbman-Andrus patents not involved therein and not previously licensed to Stearns. By such agreement, Gelbman and Andrus granted to Besser Co. and to Stearns licenses on their patents and on any relevant improvements and subsequent inventions. Each license was exclusive (except for the license to the other company), and the parties agreed that additional licenses would be granted only with the consent of all parties to the agreement.

Between 1942 and the institution of the present action, defendants have insisted that the Gelbman-Andrus patents be respected. When necessary, infringement actions have been instituted, the most recently adjudicated action being *Andrus* v. *Whitman*, 93 F. Supp. 383, decided by Judge Picard (who also presided at the trial of this action), in an opinion which sustained the validity and found infringement of the Gelbman apparatus patent, and which sustained the validity but found no infringement of the Scott patent and the Gelbman method patent. In settlement of various of the infringements or claimed infringements, defendants have, from time to time, granted limited licenses to the parties charged with infringement to permit them to carry out planned programs of manufacture without financial loss.

In 1946 Besser Co. purchased the assets and good will of Stephen Flam, Inc., a California corporation engaged in the manufacture of block making machinery. At the same time, Stephen Flam individually executed exclusive licenses to Besser Co. under certain patents and patent applications owned by him, agreed to assign such patents on full payment of an $80,000 consideration, took employment with Besser Co. on a part-time consultant basis for five years at $6,000 per annum, agreed to grant Besser Co.

an exclusive license under inventions made by him during the period of his employment, and also agreed not to engage in the manufacture of concrete block making machines for eight years except in connection with Besser Co. These agreements superseded an earlier contract of 1938 whereby Flam had granted Besser Co. an exclusive, non-assignable license under certain enumerated patents owned by Flam excepting from the license nine western and southwestern States. Flam had further agreed to render consultant services to Besser Co. on a part-time basis. There is nothing in the record with respect to the circumstances of the making or performance of the Flam agreements except the contracts themselves.

Between 1946 and 1948 Besser Co. bought 87,000 shares of the 198,833.5 outstanding shares of Stearns stock, at a cost of nearly $1,000,000. Although three new directors were thereafter elected at the next stockholders' meeting, the undisputed evidence, coming in part from the government's own witness, is that Besser had not participated in or made any comments concerning the management of Stearns between such election and the date of the trial. Prior to the trial, Besser Co. entered into a still unexecuted agreement to sell this stock.

In October 1947, Besser Co. established the policy of distributing certain of its most advanced machines under lease contracts rather than by outright sale. The lessee makes an initial deposit which is credited against the subsequent payments due under the lease, which payments are based on the number of blocks produced, with a specified minimum monthly rental.

The government's complaint included charges resting on a 1931 purchase of stock of the Consolidated Concrete Machinery Company and a 1935 purchase of certain assets of Industrial Brownhoist Co. The trial court found for

defendants on these transactions, and they require no further comment.

The government contended:

> (a) that defendants have combined and conspired to restrain and to monopolize interstate trade and commerce in concrete block making machines, and that Besser Co. and Besser have attempted to monopolize and have monopolized such trade and commerce, and that the district court should so find and enjoin them therefrom;
>
> (b) that defendants' license agreement of December 7, 1942 is unlawful, and that their use of patents subsequent thereto has likewise been unlawful;
>
> (c) that Besser Co. and Besser should be required to divest themselves of any financial interest in or control over Stearns, and be perpetually enjoined from acquiring any interest in any other concern manufacturing concrete block machines; and
>
> (d) that the district court should order Besser Co., at the option of its lessees and on such terms and conditions as the court might propose, to terminate the leases for its machines and sell them outright.

This action went to trial in the district court before the Honorable Frank A. Picard on May 16, 1950. On January 31, 1951, the district court rendered its opinion herein which found for defendants in some respects and against defendants in other respects, concluding that violations of the Sherman Act had been established. A copy of this opinion is attached hereto as Appendix A.

On April 12, 1951, the district court entered its final judgment herein, which adopted the previously filed opinion as its findings of fact and conclusions of law. A copy

of this judgment is attached hereto as Appendix B. This judgment, in respects pertinent to this appeal:

Par. I

(a) determined that defendants had conspired to restraining and monopolize commerce in concrete block making machines, and that Besser Co. and Besser had attempted to monopolize and had monopolized such commerce;

Par. III

(b) applied the provisions of the judgment applicable to any defendant to "such defendant, its subsidiaries, successors, assigns, and each of its officers, directors, agents, employees and any other person acting under, through, or for such defendant."

Par. IV(A)

(c) directed that within sixty (60) days, Besser Co. and Besser present to the district court their plan for divesting themselves of all stock holdings or other interests, direct or indirect, in defendant Stearns, such plan to provide for such divestiture by July 1, 1951;

Par. IV(B)

(d) directed Besser Co. and Besser to cancel any and all contracts, agreements or understandings, in effect prior to the judgment, providing for the divestiture of such stock, and enjoined them from adhering to or enforcing any rights under said contracts, agreements or understandings;

Par. V(A)

(e) perpetually enjoined Besser Co. and Besser from acquiring without prior notice to the Attorney General and approval by the court, the business, physical assets, or good will, or any part thereof, or any capital stock or security of any person engaged in the manufacture of concrete block making machines;

Par. V(B)

(f) perpetually enjoined Besser Co. and Besser from causing, authorizing, or knowingly permitting any of their officers, directors, agents, or employees to serve as such for any other such person or firm;

Par. VI(A)

(g) nullified the entire license agreement of December 7, 1942, between Besser Co., Stearns, Gelbman and Andrus which had granted Besser Co. and Stearns exclusive licenses to exploit certain patents of Andrus and Gelbman;

Par. VI(B)

(h) perpetually enjoined defendants from conveying or receiving any patent rights under any license, contract or agreement which gives the licensee or licensees control over the number of licenses issued or to be issued, "or which has the same unlawful purpose and effect as the . . . license agreement of December 7, 1942";

Par. VI(C)

(i) enjoined all defendants, except Stearns, from instituting, threatening, maintaining, or continuing any suits, with the exception of three actions already decided at the date of the judgment [see *Andrus* v. *Whitman*, 93 F. Supp. 383 (E.D. Mich., 1950)] for infringement of any patents referred to in the next succeeding paragraph, which infringement had occurred prior to the date of the judgment;

Par. VII(A)

(j) directed all defendants, except Stearns, to grant to any applicant therefor a non-exclusive license to make concrete block making machinery under any or all of their patents, which pertaining to concrete block making machines, are now existent, or which are issued or applied for within ten (10) years; and en-

joined them from transferring any of such patents other than subject to this provision;

Par VII(B)

(k) enjoined all defendants, except Stearns, from including any restriction or condition whatsoever in any license or sublicense granted pursuant to the above provision, or any license of such patent presently owned or acquired within the next ten years, and "in order to arrive at a fair royalty price for the use of" such patents, ordered Gelbman and Andus to appoint two representatives to act with two other persons appointed by the Government on an extra-judicial "committee" to determine such "fair" royalty prices and the form and contents of such royalty contracts; provided that, if such "committee" could not agree on the terms of the contracts, or on a choice for a fifth member of the "committee," the court might elect to make himself a member or appoint a fifth member; and directed that "the same method and manner" should be used to determine such royalty rates and contract covering such patents, "present and future," owned or controlled by Besser Co. and Besser;

Par. VII(C)

(l) ordered the filing of the royalty prices and contract forms so set with the district court, to become a part of the judgment "as though it were now included herein";

Par. VII(D)

(m) provided that nothing therein should prevent any applicant from attacking "in the aforesaid proceedings" the validity or scope of any of the patents, nor should the judgment be construed as imputing any validity or value to any of the patents;

Par VIII(A)

(n) directed Besser Co., within thirty (30) days of the judgment, *i.e.*, by May 12, 1951, to notify each lessee

of its machines of an option, open until October 1, 1952, to (1) continue its lease, (2) terminate its lease, or (3) "enter into an agreement to purchase the machine or machines leased, and the accessory equipment used, as mutually satisfactory to the parties concerned";

Par. VIII(B)

(o) directed Besser Co. to sell repair parts at reasonable, non-discriminatory terms to any such lessee or purchaser;

Par. IX

(p) enjoined defendants from entering into, adhering to, or claiming any rights under any contract, agreement, or understanding with any person engaged in the development or manufacture of concrete block making machinery designed to prevent such person from competing with them; and

Par X

(q) enjoined defendants from coercing any person to refrain from manufacturing concrete block making machinery or from furnishing supplies to such manufacturers.

On May 8, 1951, petitioners applied to the district court for a stay of certain provisions of the judgment herein pending the perfection of an appeal to the Supreme Court of the United States. The court refused to grant such stay until petitioners had appointed their two representatives on the extra-judicial "committee" to set royalty and contract terms established in paragraph VII (B) of the judgment, and until such "committee" had met and performed its assigned duties. Accordingly, under protest and pursuant to a specific ruling made by the trial court on May 8th, that such action would be without prejudice to their appeal rights, petitioners, on May 9, 1951, designated two representatives to this "committee."

Meantime, the government had already designated as its "committee" representatives Eugene F. Olsen and Roy Darden, both of whom had been government witnesses at the trial. Olsen, formerly president of Stearns, is president and principal stockholder of the Gene Olsen Corporation, one of Besser Co.'s foremost competitors. At the trial, Olsen had testified that "there is not a large number who are manufacturing [concrete block making] machines and who are not infringing the Gelbman and/or the Scott patents," and, when asked by the court if he claimed that his own machine did not so infringe, had replied "No, I have not claimed that." Darden, the other government representative, also is a manufacturer of concrete block making machinery. A patent infringement suit instituted in 1946 by Gelbman and Andrus involving Darden's machine was settled, at Darden's instance, by granting him a limited license to manufacture a specific number of machines. This license was still outstanding at the time of the trial.

On May 11, 1951, Mr. Justice Reed of the Supreme Court of the United States stayed for thirty (30) days the provisions of paragraphs IV(A), VI, VII, VIII, and IX of the final judgment herein, with the exception of the provisions of paragraph VII dealing with the royalty "committee," and the provisions enjoining the institution of suits and the making of certain contracts enumerated in paragraphs VI (C) and IX respectively.

Thereafter, on May 21 and 22, 1951, the "committee" met, ostensibly to attempt to agree upon "a fair royalty price" for the use of the patents involved. At these sessions, to which Olsen and Darden brought private counsel, no agreement was possible because such counsel insisted upon setting only "nominal" royalties. Upon an informal report of this inability to agree, the trial judge, on May 23rd, designated himself as the fifth member of this extra-judicial "committee." Prior to this designation, counsel

for petitioners had requested, without prejudice to their appeal, that the full "committee" thereafter follow formal procedures so that the evidence relevant to the proper amount of such "fair royalty price" might be presented to the "committee" and the parties heard thereon. At the meeting at which the trial court designated himself as the fifth "committee" member, one of petitioners' representatives on the "committee" orally made the same request. The trial judge refused, and, without permitting petitioners to produce any evidence as to a "fair royalty price," forthwith accepted the royalty figures proposed by the government's representatives on the "committee," which figures their counsel had, to the court's knowledge, previously described as "nominal." On May 29, 1951, the Trial Judge, acting in an individual capacity as a fifth member of the "committee" delivered to Government Counsel a "Proposed Form of License Agreement" incorporating these figures as the final royalty prices, which report was filed on May 29, 1951 by the Government with the Clerk of the District Court purportedly to become thereby a part of the Final Judgment.

The Questions Are Substantial

This appeal presents substantial questions, which for convenience, may be subdivided into three categories.

a. *The Findings and Conclusions That Petitioners Violated the Sherman Act*

Three points will illustrate, without exhausting, the substantial nature of the questions raised under this category:

1. The district court erroneously condemned, as a violation of the Sherman Act, the 1942 contract whereby Gelbman and Andrus granted exclusive patent licenses to Stearns and Besser Co. Such a license agreement, entered

into partly to settle *bona fide* patent litigation, is valid, even when exclusively granted to two licensees (see *Standard Oil Company* v. *United States*, 283 U. S. 163, 171-172 (1931); *United States* v. *General Electric Co.*, 272 U. S. 476, 489 (1926); *Virtue* v. *Creamery Package Company*, 227 U. S. 8, 32-33 (1913); *Bement* v. *National Harrow Co.*, 186 U. S. 70, 94 (1902); *Flexner Co.* v. *Faussner Co.*, 145 F. (2d) 528, 539 (C. C. A. 7th, 1944).)

Such a valid, non-assignable, exclusive license necessarily implies that no other licenses shall be granted unless, by mutual agreement of all parties thereto, the license agreement is modified. The 1942 Gelbman-Andrus-Besser Co.-Stearns agreement provided explicitly that further licenses should be granted only on consent of all parties to the license agreement. To the extent that this provision was relied on by the trial court to invalidate the agreement, the court erroneously held that an explicit statement of terms necessarily implicit in such a license contract is fatal to the license.

The court erred further in holding that the contract was made illegal under the Sherman Act because it included an agreement subsequently to license improvements or future patents in the same field [*cf. Transwrap Corp.* v. *Stokes Co.*, 329 U. S. 637 (1947); *Aspinwall Manufacturing Company* v. *Gill*, 32 Fed. 697 (C. C. N. J. 1887), app. dis. 140 U. S. 699 (1891)].

The district court's erroneous conclusion as to the legality of the 1942 agreement was the principal, if not the sole, support of its determination that there was a conspiracy or combination in restraint of trade among defendants, and was also a main support of the finding that petitioners had an illegal monopoly. Since this erroneous conclusion was the basis for an important part of the specific provisions of

the judgment below, the legality of the 1942 agreement presents a substantial question for review.

2. The district court erroneously condemned as violations of the Sherman Act the 1946 contracts, summarized above, between Besser Co. and Stephen Flam, Inc. and Stephen Flam individually. Except for the written contracts themselves, introduced as exhibits, nothing appears in the record concerning these agreements, their purpose or the circumstances surrounding their negotiation. That there was nothing illegal *per se* in any of the agreements is obvious from the summary of their provisions. The broad inferences drawn by the district court from the contracts themselves are unwarranted, and were erroneously used by the trial court as a basis for its conclusion that petitioners had attempted to obtain a monopoly. Such basic error presents another substantial question for review.

3. The district court erroneously found a violation of the Sherman Act in the insistence of defendants that other manufacturers not infringe their patents. The evidence showed that Besser Co. was the owner of patents known respectively as the Scott patent and the Wellnitz patent, the latter having been acquired only shortly before the trial. There was no contention, no evidence, and no finding that the acquisition of either of these patents was tainted by any illegality. The undisputed evidence of the government's own witness, Olsen, was that there were few manufacturers of concrete block making machines who did not infringe the Gelbman or the Scott patents. Olsen admitted that if the Gelbman and the Scott patents were valid, he would not claim that his own machines did not infringe, but rather thought he might be infringing. That the Gelbman and the Scott patents are valid was adjudicated in *Andrus* v. *Whitman*, 93 F. Supp. 383 (E. D. Mich., 1950),

which case was decided prior to the opinion or judgment here under review.

In this context, the trial court erroneously concluded that these defendants violated the Sherman Act by pointing out to other manufacturers claimed infringements of their valid patents. The correctness of the court's determination that a warning of infringement, unless followed by litigation or negotiation, is an abuse of the patent right which violates the Sherman Act presents a further substantial question for review.

b. *The Punitive Nature of the Judgment Entered*

Even assuming *arguendo* that these defendants may have violated the Sherman Act, the punitive provisions of the final judgment present substantial questions for review. Four points will illustrate, again without exhausting, the substantial nature of the questions raised under this category:

1. By requiring the compulsory licensing of "any, some or all patents and patent applications pertaining to concrete block making machinery now owned or controlled by the defendants," the judgment, in effect, confiscates the patent rights of petitioner Besser Co. in the Scott and the Wellnitz patents, although no evidence suggested any impropriety in their acquisition and they were not involved in the 1942 agreement. The Scott patent has only recently been adjudicated valid [see *Andrus* v. *Whitman*, 93 F. Supp. 383 (E. D. Mich. 1950)]. No claim of invalidity is made as to the Wellnitz patent, acquired at considerable expense by Besser Co. early in 1950. Nothing in the opinion, which constitutes the findings of fact and conclusions of law, or in the evidence, suggests any basis for depriving Besser Co. of its legal rights as assignee under the Scott and the Wellnitz patents [see *Hartford-Empire Co.* v.

United States, 323 U. S. 386, 417, (1945); *Crown Co.* v. *Nye Tool Works*, 261 U. S. 24, 34-35 (1923)]. The propriety of this provision of this judgment also presents a substantial question for review.

2. The judgment further requires petitioners to open to compulsory unlimited and unrestricted licensing "any, some or all patents and patent applications pertaining to concrete block making machinery . . . which are issued or applied for within ten years from the entry of this final judgment [Par. VII (A)]." Under this provision, if Besser Co. or Besser, eight years hence, should patent a new development in the industry, discovered through their own research and inventive genius, such patent must forthwith be offered to the entire industry at rates fixed by the royalty "committee" set up in the judgment. In *Hartford-Empire Co.* v. *United States* (*supra*), 417-418 (1945), the Supreme Court condemned a similar provision. Its inclusion in this judgment, in the face of such condemnation, presents a substantial question for review.

3. Since 1947, Besser Co. has leased rather than sold certain of its most advanced machines. By directing Besser Co. to notify every lessee that it may terminate such lease at any time prior to January 1, 1953, or continue the lease, or "enter into an agreement to purchase the machine or machines leased [Par. VIII(A)]," the judgment, in effect, invalidates the existing lease contracts. In *Hartford-Empire Co.* v. *United States* (*supra*), 412-413, 419, 420, 422, the Supreme Court condemned an analogous provision. Its inclusion here presents another substantial question for review.

4. The judgment incorporates other provisions specifically disapproved by the Supreme Court: *e. g.*, it is not limited to the United States [*Hartford-Empire Co.* v. *United States*, *supra*, 410]; the restrictions on Besser Co.

and Besser or their privies, holding office or financial interest in other concerns manufacturing concrete block making machines [Par. V(A)(B)] are too extensive (*ibid.*, 410, 424-426); the provision that nothing therein should prevent any licensee from attacking the validity or scope of the licensed patents [Par. VII (D)] is improper [*United States* v. *United States Gypsum Co.*, 340 U. S. 76, 94 (1950)]. These and other punitive provisions present substantial questions for review.

c. *The Improper Delegation of Judicial Functions to a Lay Royalty "Committee"*

Further substantial questions arise from the provisions of the judgment establishing an extra-judicial "committee" to set royalties and contract terms, the actions of such "committee" and the participation of the district judge therein.

The requirement that the royalty and license terms, under the compulsory licensing erroneously ordered by the district court, should be determined by an extra-judicial lay "committee" [Par. VII (B)], on which the district court finally elected to sit, constitutes an unprecedented method by which to determine facts which shall become part of the final judicial judgment herein. According to the judgment, this "committee" must set the royalties and the contract terms for any future patents acquired by petitioners in the next ten years, such royalties and terms also to become part of this judgment. No authority exists for any such procedure, and its inclusion in this judgment presents a substantial question for review.

Petitioners were further denied fundamental rights by the informal act of the trial judge in appointing himself as the fifth member of such extra-judicial "committee," and by his subsequent action in summarily, by what was in effect a

3-2 "committee" vote, fixing royalties at rates previously described by counsel for the government representatives as nominal. The judge, acting in a non-judicial capacity as a "committee" member, refused to grant petitioners an opportunity to present evidence relevant to a "fair royalty price." The error of this proceeding was compounded by the fact that no provision was made in the judgment for any judicial review of the "committee" action. Moreover, any attempt to secure judicial review would be abortive if brought on before the same judge who had already departed from his judicial function to constitute himself a voting member of the lay "committee."

The foregoing raises, among others, the questions whether such a delegation of the judicial function to a "committee" of laymen is appropriate under the federal system of the administration of justice; whether important property rights, presently existing or coming into existence within ten years, may thus be confiscated by an *ad hoc* "committee" acting without evidence or hearing; and whether a district judge may properly abandon his judicial duties to vote a 3-2 "committee" report which shall become "a part of the judgment." The entire provision and its attempted execution obviously present substantial questions for review.

Respectfully submitted,

CARL R. HENRY,
Attorney for Petitioner,
Jesse H. Besser,
Alpena, Michigan.

JOHN W. BABCOCK,
Attorney for Petitioner,
Besser Manufacturing Company,
2276 Penobscot Building,
Detroit 26, Michigan.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

Civil No. 8144

UNITED STATES OF AMERICA, *Plaintiff*,

vs.

BESSER MANUFACTURING COMPANY, STEARNS MANUFACTURING COMPANY, INC., JESSE H. BESSER, LOUIS GELBMAN, AND HAMLIN F. ANDRUS, *Defendants*

OPINION OF THE COURT

The government brings this action under Section 4 of the Sherman Anti-Trust Act, Ch. 647, Sec. 4, 26 Statute 209; 15 U.S.C. Sec. 4, charging that defendants conspired to, and did, create a monopoly in the manufacture of concrete block making machines in violation of Sections 1 and 2 of the Act. Defendants are Besser Manufacturing Company and Stearns Manufacturing Company, Inc., producers of concrete block making machines, Jesse H. Besser, who owns 99 per cent of the Besser Manufacturing Company (his wife 1 per cent) and Louis Gelbman and Hamlin F. Andrus, who own important patent rights used in the machines produced.

It is first necessary, therefore, to determine whether the facts prove that a monopoly has been created.

Besser Manufacturing Company (hereinafter called "Besser") is not only a pioneer but today admittedly holds a dominant position in manufacturing concrete block making machines. The company was founded by the father of Jesse H. Besser at Alpena, Michigan in 1897 as a stave and shingle mill and in 1904 expanded into the concrete block making machine business. At that time each step in the making of concrete blocks was entirely by hand beginning with the proper mix being shoveled into forms, tamped and then taken out. One machine could produce 150 blocks per day.

Since then the industry has gone through various stages from "hand" to the "power tamper" (developed by Besser in 1909—capacity 450 blocks per day); the automatic feeder in 1914 (capacity 1800 blocks per day) until 1924 when the Besser plain pallet stripper tamper was invented and one machine was capable of producing 3600 blocks one at-a-time in an 8 hour day. This patent, issued in 1929—and this fact becomes important—expired in 1946. Besser also later purchased the Scott patent rights applied for in 1927 and granted in 1938. Scott as decided by this court (Andrus v. Whitman, 93 Fed. Supp. 383) was a patent covering vibration of the mix in the form.

In 1939 came the Gelbman-Andrus patents with their coordinated vibration and tamping machines that received the mix into the vibrating form followed by automatic pressure. With the present Besser Super Vibrapac it is possible for one machine to make over 6000 standard size 8" x 8" x 16" blocks in one 8 hour day. But there are still concrete block making machines of the hand tamping type being manufactured, utilized and a few sold. Still others are semi-automatic.

So if we are to consider the production possibilities of all concrete block making machines that were being manufactured by the 50 odd concerns for the years 1946-7-8 the figures are as follows: (xx)

	All Other Manufacturers Tampers — Vibrators			Besser and Stearns Tampers — Vibrators	
1946	334	1048		140	356
Total	1382		Total	496	
1947	266	351		79	407
Total	617		Total	486	
1948	101	331		18	195
Total	432		Total	213	

(xx) in million blocks per year.

Defendants insist that this "production capacity" should be the yardstick to determine whether the Besser-Stearns

combined companies have a monopoly and not the "dollar value" of those machines as contended by the government.

On the other hand, the government insists that the use of dollar value is the normal, reasonable and correct method of measuring industry position particularly where the high production automatic machines of the vibrator type assume such a controlling position in that industry.

It points to sales figures demonstrating the importance of the vibrator type machine, which show that in 1946 vibrator machine sales represented 79.6% of total dollar industry sales; in 1947, 83.6%; and in 1948, 91.8%. Of this latter total, Besser and Stearns controlled 69%. To the government these figures become even more revealing when it is considered that a substantial part of the industry to which defendants refer, is not in competition with companies manufacturing the high production machines, for it claims that these low production machines afford no more competition than do hand shovels to large powerful excavating equipment. It reasons that "dollar value" of the machines manufactured should be the yardstick and if we consider this formula as a basis to determine whether the Stearns-Besser combination has a monopoly in the concrete block making machine industry we learn the following:

IN DOLLAR SALES OF ENTIRE INDUSTRY

	Besser and Stearns	The 53 Other Manufacturers
1946	49.7%	50.3%
1947	67.2%	32.8%
1948	65%	35%

Note: In 1946 Besser secretly purchased 13,000 shares of Stearns stock, its chief competitor, and in 1948 succeeded in buying 74,000 shares more. Besser then held 87,000 of the 198,833.5 shares of Stearns stock outstanding and forthwith elected three out of the five men on the Stearns board.

The evidence further shows that among the 50 odd companies which divided the 35 per cent of dollar sales in 1948—

LITH-I BAR had	7.8 per cent of the whole and
J. W. APPLEY	5.9 per cent of the whole

leaving the other 50 odd companies to divide the remaining 21.3 per cent.

The question is whether the court should consider "dollar value" or "production capacity" and here defendants insist that the bill of complaint eliminates any possibility of dollar value because it uses the word "production" which defendants interpret as meaning the "number" of blocks that can be made by those machines.

The court does not decide whether defendants' control of 33 per cent of the output possibilities from all machines produced constitutes a monopoly but incidentally it was held in United States v. Reading Co., 253 U. S. 26 that 33⅓ per cent of the total output of anthracite coal carried by defendant was sufficient to be a monopoly and in United States v. Lehigh Valley R. R. Co., 254 U. S. 255 the figure of 18.84 per cent. In any event we hold to no such narrow interpretation of the word "production." Nor has the plaintiff so limited itself, for in paragraph 14 of the complaint it charges defendants with restraints and monopoly in interstate commerce of concrete block machinery. "Commerce" is the business of buying and selling of commodities for money, W. W. Montague & Co. v. Lowry, 115 F. 27, Aff. 193 U. S. 38; U. S. v. Swift & Co., 122 F. 529; and here the commodity to which the government has reference is the concrete block machine, not its end product. But to this court "production" may mean either "production capacity" or "dollar value" dependent upon the commodity and here we determine that dollar value may be the measuring gauge. In this deduction we are fortified by decisions of our courts where dollar value has frequently been used, U. S. v. U. S. Gypsum Co., 333 U. S. 364, but more particularly in U. S. v. American Can Company, 87 F. Supp. 18, where the court considered that defendant had a monopoly on tin plate because it manufactured more than 200 million dollars worth of cans out of a total tin plate worth upwards of 500 million dollars. In fact "dollar value" is used throughout that opinion.

We also note with interest page 115, monograph No. 21, "Investigation of Concentration of Economic Power," Temporary National Economic Committee (76th Congress, 3rd Session); and Department of Commerce Report (Census of Manufacturers) to House of Representatives Subcommittee on Study of Monopoly power (Celler committee) dated

December 1, 1949, where "dollar value" was used in inquiring into the existence of monopoly power and control.

When two closely related corporations have 65 per cent of the dollar value of any industry and the balance is divided between over 50 other manufacturers with the nearest competitor having less than 8 per cent of the whole, we believe that such a combination has to all intents and purposes a monopoly within the meaning of the law. Add to this the fact that it's the big automatics that are important, not the hand tampers on the semi-automatics, and we find the position of Besser-Stearns in the industry is overwhelming. It has the power in its field to control the prices—meeting the test of the rule laid down in American Tobacco Co. v. U. S. 328, U. S. 781 as well as that found in U. S. v. American Naval Stores Co., 172 Fed. 455—

> "The popular meaning of 'monopoly' at the present day seems to be the sole power (*or a power largely in excess of that possessed by others*) of dealing in some particular commodity, or at some particular market or place, or of carrying on some particular business." (Emphasis ours)

We do not conceive that the Sherman Act anticipates that no deterring steps can be taken until a 100 per cent monopoly has become a "fait accompli."

> "It is not essential that the result of the combination be a complete monopoly, it is sufficient if it merely tends to that end and to deprive the public of the advantages which flow from free competition." U. S. v. E. C. Knight Co., 156 U. S. 16.

The Clayton Act (Section 7) 15 U. S. C. 18 aims to strike down a monopoly at its inception, when the first step is taken—Arrow-Hart & Hegeman Electric Co. v. Federal Trade Commission, 65 F. 2d 336, 340; the Sherman Act after it has become more virile.

A committee of the Judiciary of the Senate in its report accompanying the Clayton Act, dated July 22, 1914, said:

> "Broadly stated, the bill, in its treatment of unlawful restraints and monopolies, seeks to prohibit and

> make unlawful certain trade practices which, as a rule, singly and in themselves, are not covered by the act of July 2, 1890 (the Sherman Act) or other existing anti trust acts and thus, by making these practices illegal, to arrest the creation of trusts, conspiracies, and monopolies in their incipiency and before consummation." (1949 Cong. Rec. 11730).

We hold that Besser controls Stearns and that the Besser-Stearns alignment created a monopoly.

Legality

We come then to the issue of whether this particular monopoly is illegal and we start with the oft repeated holding that the Sherman Act must be given a reasonable construction to accomplish its purpose. U. S. v. Union Pacific R. R. Co. 226 U. S. 61. "Bigness" as such, is not prohibited, U. S. v. U. S. Steel Corporation, 251 U. S. 417; U. S. v. Paramount Pictures, 334 U S. 172, although the courts have said that monopolistic power of itself constitutes an evil and is to be condemned whether the acts creating it have been lawful or unlawful. U. S. v. Griffith, 334 U. S. 100; Schine Theatres v. United States, 334 U. S. 110; U. S. v. Paramount Pictures, supra.

The rule, however, is that there must be the existence of power

> "to exclude competition when it is desired to do so" if "coupled with the purpose or intent to exercise that power."
>
> American Tobacco Co. v. U. S., supra;
> U. S. v. Griffith, supra 107;
> U. S. v. Patten, 226 U. S. 325-543; and
> U. S. v. Aluminum Company of America, 148 F. 416 at 432

or the intent to bring about the forbidden act, to-wit, the monopoly. U. S. v. Aluminum Company of America, supra.

Power and intent

As for intent—since this is only a state of mind rarely expressed or written down for the scrutiny of others—the courts generally say that all persons

> "must be held to have intended the necessary and direct consequences of their acts and cannot be heard to say the contrary."

U. S. v. Masonite Corp., 316 U. S. 275 and cases cited;

U. S. v. Patten, supra 543; U. S. v. Griffith, supra.

History of Besser

Let us then follow development of Besser up to the time this suit was started. We mention this because defendants at one point in their briefs argue strenuously that what has happened since that day cannot be taken into consideration by this court, while later therein they cite their own acts, after suit filed, aimed at purging themselves of any possible taint of monopoly. But at this point this court is interested only in the status of the alleged Besser combination as of the day of suit.

Consolidated Concrete Machinery Corporation

In 1929 the chief competitor of Besser was Consolidated Concrete Machinery Corporation world's largest producer of concrete block machinery units and running Besser a hard race for number one position in dollar sales. One E. F. Olsen was its president and the evidence is conclusive that Consolidated Concrete Machinery Corporation was in distress having taken many steps to preserve its life by manufacturing other products.

It had lost $ 33,040.50 for the year ending May 31, 1928,
It had lost 37,000.00 for the year ending May 31, 1929,
It had lost 180,000.00 for the year ending May 31, 1930,

and in 1931 Besser bought a controlling interest in Consolidated

> "at the request (Besser's testimony) of one of Consolidated's stockholders who had loaned it some money."

Besser then revamped Consolidated's board of directors by naming four of its seven members and in 1932 the company was dissolved; what was left of the plant moved to Alpena and its real estate sold.

The government contends that here was the first step in the design of Besser to accomplish its monopoly.

We cannot agree with this conclusion.

Our memory reverts to the years 1929, 1930 and 1931 and Consolidated only went the way of many other companies that might have survived if there had been no depression. If Besser, closely held, efficiently managed, and with its payroll limited in the high brackets, was able to continue business and buy out a competitor at that time we can see no objection.

BROWNHOIST

This court takes the same position regarding purchase by Besser of the Brownhoist block making equipment, inventory and other assets in 1935. Only an infinitesimal part of the Brownhoist business was devoted to concrete block machine manufacture and Brownhoist was moving back to Bay City from Cleveland where the operation of such a business could be a thorn in Besser's side right in its own backyard. Bay City is the first large city in the vicinity of Alpena. Of course we do not contend that one may, with impunity, remove all such thorns but there can easily develop unfair competition by a company operating a "sideline" that cripples a legitimate business wherein the "sideline" is the main object of its existence. To hold its elimination of such possible menace by purchase, rather than pushing the infringement suit it had threatened, was wrong, might encourage a philosophy that could destroy rather than help free enterprise and the ultimate development of our economic life. In our opinion it cannot be successfully reasoned that these two acquisitions—Consolidated and

Brownhoist—were attempts by Besser to promote its position to a monopoly of this industry.

We therefore see nothing illegal about the Brownhoist transaction.

But must the charges fall completely because plaintiff's allegation of 1931 as the beginning date of the conspiracy or monopoly, has been refuted?

We know of no rule that limits the government to proof of the exact date the attempt or realization of the monopoly began. The government, must, of course, be held within the ambit of its charge and we believe that 1942 specifically included in the bill of complaint, was within that ambit. Here we find what this court believes to be the most important development of the Besser empire for in 1942 was when Besser and Stearns agreed to control the Gelbman-Andrus patents which contract we will discuss later.

But continuing we learn that by 1946 there was a building boom in the United States which is still unsatisfied. Shortage of steel and other construction materials made concrete blocks more desirable and hence more salable. In addition they had been improved in style, attractiveness, efficiency and stability. The hand of fate and the business acumen of Besser had disposed of its chief competitor, Consolidated, back in 1931, but as there is always at least one automobile on the road ahead, no matter how many you overtake, there is likewise always a chief competitor to give you concern. In the instant case there were two main road blocks against Besser realizing its exclusive place in the sun—Stephen Flam, Inc. of California and Stearns Manufacturing Company of Adrian, Michigan.

The Flam Sale

Back in 1938, Besser had made a contract with Stephen Flam, Inc. of California, whereby Besser was given exclusive rights not only under Flam's existing patents but also under

> "any apparatus, machinery and devices which may be equipped with any type of vibrating or jolting devices other than as disclosed and claimed in said patents"

such rights to be exercised throughout the United States except that Flam retained the right to manufacture in nine western states.

Then in 1946 Besser bought out Flam completely, for $385,000.00 and in that year the conspiracy and monopoly undeniably began to show substance. The reasonable deduction is that Flam was giving Besser too much competition in nine states reserved to it. Flam was then fourth in dollar sales in the United States so Besser decided to remove this fly in the ointment. It purchased Flam's exclusive licenses, had Flam agree to stay out of the concrete block machine making business for 8 years and to make sure that it did, it gave Flam a job for 5 years. Then it went further—it got exclusive rights to any future patents Flam might get during the 5 years he was working for Besser.

The Besser-Stearns-Andrus-Gelbman Contract

This deal was the climax.

Besser's customer, Bell, had been sued in 1941 by co-defendants Gelbman and Andrus for alleged infringement of the Gelbman-Andrus patents then licensed only to Stearns. As a result of the Bell suit an agreement was entered into December 7, 1942, between the inventors and the two separate concerns, Besser and Stearns, whereby Besser, Stearns and the inventors were to live in peace and harmony. Stearns and Besser were each given the right to use the Gelbman and Andrus patents—but exclusively to them—and it was agreed that they were to have the benefit of, and right to use, any and all future improvements and patents covering concrete block making machines that might come from the fertile minds of either Andrus or Gelbman or both.

But this contract also contained a provision that not only prohibited the patentees giving anyone else a license, it also prevented either Besser or Stearns from joining Gelbman and Andrus in giving other prospective licensees the right to use any of the patents covered without the other's consent.

The above and Flam agreements are bitterly attacked

by the Government as illegal and the main overt acts in the monopolistic achievement.

Let us concentrate on the above Besser-Stearns-Gelbman-Andrus 1942 contract.

Unquestionably its purpose was to make certain that these two giants of the industry didn't battle each other over patents any more. But is there anything in the agreement itself frowned upon in the light of recent decisions of our Supreme Court? Does control of a patent give the patentee or licensee the rights contended for by defendants either solely or together?

Granting that an exclusive license may be valid, Crown Co. v. Nye Tool Works, 261 U. S. 24-37; U. S. v. Gen. Elec. Co., 272 U. S. 476-489, the Supreme Court has recognized certain limitations, and where such a license has for its purpose the suppressing of competition, it has been held invalid.

> "The Sherman law is a limitation of rights, rights which may be pushed to evil consequences and therefore restrained." Standard Sanitary Mfg. Co. v. U. S., 226 U. S. 2049.

We believe that the contract under question goes further than is necessary to protect the patent monopoly of Gelbman and Andrus. It may well be that an exclusive license to one party would be valid, but here the patentees have joined hands with the two largest competitors in the industry, and by terms of their agreement have virtually made it impossible for others to obtain rights under those patents. The contract even gives Stearns and Besser the power to restrict competition—present and future—by requiring their joint consent before licensing others. It is this combination requiring collective action that primarily invalidates the agreement. We believe it clear that the parties intended this contract to be a means whereby control of the industry could be acquired and competition eliminated. For what other reason would Besser or Stearns want the consent of the other before approving a licensee suggested by the patentees? And where it is apparent, as it is here, that the contract is to eliminate competition, it must be

held illegal. As the court stated in U. S. v. Parker-Rust-Proof Co., 61 F. Supp. 805, 813:

> "The primary purpose for entering into this contract was to eliminate present competition and prevent future competition. The Anti-Trust Acts condemn a contract entered into for the purpose of eliminating competition that exists as well as a contract preventing the development of future competition."

Still these contracts go further. The intent to restrain trade and the illegality is further augmented and evidenced by the provision in both the four-way agreement of 1942 and the Flam purchase contract granting exclusive rights to Besser and Stearns of all improvements to the existing patents and to inventions still unborn. Such conditions while not illegal per se cannot be justified as necessary to the enjoyment of or ancillary to the patent rights conveyed. U. S. v. National Lead Co., 63 Fed. Supp. 513, 524; U. S. v. General Electric Co., 80 F. Supp 989, 1005; Transparent Wrap Machine Corp. v. Stokes & Smith Co., 329 U. S. 637, and read in conjunction with the rest of the contract provisions and other acts herein enumerated, makes the conclusion inescapable that the Besser-Stearns group had and achieved an obvious objective that cannot be reconciled with the restrictions of the Sherman Anti-Trust Act.

These agreements are in our opinion fatal to defendants and as of the day of the trial were the wrongful acts of not only Besser in the Flam contract but in the December, 1942 agreement of all other defendants including Gelbman and Andrus. The latter took advantage of that contract and were active participants in threatening with suits those who supposedly violated their patents by infringement. Gelbman and Andrus were anxious not to protect their patent rights but to protect their contract with Besser and Stearns. And it all stems back to 1942 when Gelbman and Andrus entered into this agreement with Besser and Stearns. Then was the real beginning of the fruition of the monopoly, resulting from a conspiracy of the parties to that agreement to accomplish an illegal objective.

We pass now to 1946. Up to this point Besser apparently hadn't done anything about the Stearns Manufactur-

ing Company, probably because Besser owned the plain pallet patents expiring that very year, and partly because Stearns was devoting itself to the Jolt-Crete type of machines. But when it was learned that the Stearns Company was planning on manufacturing a plain pallet concrete block making machine that's when Besser became interested. That's when Besser through its agent secretly purchased a good share of the Stearns stock and finally in 1948 secured sufficient of that stock so that out of 198,833.5 shares Besser owned 87,000.00. Besser then put its own men on the board and we find it hard to believe that Besser didn't use any influence on its three directors. Perhaps it wasn't necessary. Perhaps satisfactory results were being obtained without pressure and if the figment of separate entities could be maintained so much the better. In any event, in 1948 Besser's hold on its second chief competitor became, to all intents and purposes, complete.

Then followed real activity by Besser and members of its organization, some of it before Besser had gobbled up Stearns. The little fellows were in the way and what appears to have been a deliberate campaign to wipe out all remaining competition started.

Besser tried to buy out Co-Corp founded by Olsen after he left Stearns, and continued this activity right up to the time of the hearings in this case.

There was testimony undenied, that Park, vice-president of Besser, tried to buy Lith-I-Bar and that Besser

> "considered it imperative that the Lith-I-Bar Company be out of business."

Besser offered jobs to Milewski of Lith-I-Bar, to Olsen and his son, as it had done previously to Stephen Flam.

Then one Millard Warren (1947) built two or three block machines that Besser claimed infringed on its patents. Warren yielded to pressure, threats, and being offered "pay" without leaving his own business.

Others, Darden, Ralph Samuelson, Hanneman, John B. Lagrade, Bernard Flam, son of Stephen, all felt the persuasion of the Besser arguments. Besser brought influence on a material supply source of Darden that curtailed the

Warren output since Darden was building the Warren machine. Practically all these men got out of their own business, generally impelled by threats of lawsuits, being given a job, pressure on customers, or all three, and usually Besser picked up their then patents with a mortgage on the fruits of their genius for years to come.

It attempted to limit Appley to "cored pallet" machines that can make 2 blocks at a time and Appley signed the contract prepared by Besser. A cored pallet (2 at a time) machine incidentally has a maximum output of 4800 blocks per day but costs the producer about 5 times as much to operate as the plain pallet machine.

The proof further showed that Besser personally indicated his attitude towards competitors by his letter to Gelbman, December 21, 1946, saying:

> "About the worst thing that could happen to this industry would be to have it wide open so that anybody and everybody could make machines and thus have no control on quality and no opportunity for anyone to do anything very important."

There were other letters that denote Besser's objective to accomplish the elimination of almost every competitor through

(1) recklessly made threats of suit, illegal under Maytag Co. v. Meadows Mfg. Co., 35 Fed. 2d 403; Dittgen v. Racine Paper Goods Co., 164 Fed. 89; U. S. v. Patterson, 205 F. 292;

(2) purchase of assets, illegal under—U. S. v. Union Pacific R. R. Co., supra; U. S. v. Reading Co., 253 U. S. 26; U. S. v. Lehigh Valley, R. R. Co., 254 U. S. 255 and

(3) covenants not to compete, illegal under Schine Theatres v. U. S., supra; Shawnee Compress Co. v. Anderson, 209 U. S. 423, 434; U. S. v. American Tobacco Co., 221 U. S. 106.

It further appears that there were two or three instances where suit was threatened involving machines that agents of defendants had never even seen. The threat of a lawsuit for infringement should be bona fide and one asserting

the exclusive right granted by the United States should not indiscriminately abuse that right. At least an examination should be made of the charged machine and then a lawsuit if necessary or at least negotiations started.

Emack v. Kane, 34 F. 46;
Adriance, Platt & Co. v. National Harrow Co., 121 Fed. 827;
U. S. v. Patterson, supra;
Dittgen v. Racine Paper Goods Co., supra.

Such a statement as made by Olsen, then president of Stearns, to Darden in the presence of Gelbman and Besser that

> "there is only about $700,000.00 gross business normally in this business; we are able to take care of that, the Besser Manufacturing Company and the Stearns Manufacturing Company; there isn't any room for your company" or

the Stearns letter to Gelbman (copy to Mr. Besser) referring to Darden's audacity in daring to compete in the concrete block machine industry—

> "Stories are persistent to the effect that Darden is doing quite a lot of business and is rather rapidly expanding his organization. It might be easier to knock his ears down now than later,"

have no place in the economic struggle of business, large or small, in this country nor have many of the other acts testified to against defendant Besser.

The one further fact. Defendant Besser had during the years in question developed a leasing system, which of itself is not to be condemned, but which nevertheless adds to the realization of a complete monopoly. As improvements have been made in these units they have become larger, heavier and more expensive. They run as high as $50,000.00 each and of course there will be no stampede to buy machines at this price. It is far beyond the reach of the small manufacturer. So Besser began the leasing system paid for at the capacity of the machine at 1 cent a block.

This is possibly as economical as these blocks can be made by hand or by other automatics and the ultimate effect on the existence of small companies can easily be visualized. A great deal of this springs from the grip that the Besser-Stearns combination got on the industry during the crucial period—1946-1948—when Besser started getting its control over Stearns, just when the plain pallet patent of Besser was about to expire and Stearns had indicated that it was going to make plain pallet machines. Stearns, standing alone, could have then become even a greater competitor of Besser because it still had the right to use the Gelbman and Andrus patents; but Stearns—controlled—presented opportunities that Besser could not resist.

So all this was stopped by Besser. Regardless of whether it actually exercised control over Stearns, it was in a position to do so and could have been interested in Stearns for no other reason.

While it must be admitted that not all of these acts are prohibited, nevertheless, we must view them in the broad panorama and of other acts and their association with each other to note, not only the effect—but to pierce the veil for evidence of intent.

U. S. v. Patten, supra;
Swift & Company v. U. S., 196 U. S. 375, 396;
U. S. v. Paramount Pictures, supra;
American Tobacco Co. v U. S., supra 809;
Montague & Co. v. Lowry, 193 U. S. 38;
Fashion Guild v. Trade Commission, 312 U. S. 457; and
Associated Press v. U. S., 326 U. S. 1.

It is clear then that the intent of Besser—with its Stearns control—to dominate this industry by monopoly is obvious and that the result of the Gelbman-Andrus-Besser-Stearns conspiracy was to restrict competitors which latter is illegal under the Sherman Act. (above citations)

And here is another instance that we believe speaks volumes.

The Stone Contract

When the hearings started in this case this court was surprised to find that there had been a falling out between

certain stockholders of the Stearns Company and Besser. We soon learned, however, that just a month or so previous Besser had made a contract by which one, Stone, was to purchase part and eventually all Besser shares in the Stearns Company thus purging Besser of all taint of the monopoly that it claimed did not exist. But the contract provides so many possibilities of this interest reverting back to Besser that we have some hesitancy in accepting at face value Besser's protestations, that Stone came into the picture just because he, Stone, "likes to turn an honest dollar" and had suddenly become enamored by the concrete block making and Aglite businesses.

Nor are we overly impressed with the sudden conversion of certain stockholders of Stearns who now favor the government's action. It is apparent that they are not interested in adopting the government's viewpoint from any altruism, but, having failed to purchase the Stearns' stock from Besser, are now determined that Stone won't become dominant in their company. They are aware also that if Stone's agreement with Besser prevails, Stearns will lose some of its patent rights; it will be obliged to recognize the validity of other Besser patents; it will also admit that it had no right to use certain patents Stearns has been using for years; it will be limited to the manufacture of two at-a-time pallet machines; it may have troubles on its own patents with Besser and, finally, Stearns will be saddled with the Aglite business that is promoted by Besser to increase the sources where concrete block men may get their material, now limited.

Which impels us to inquire

> "Why, if defendant Besser considers itself free from violation of either the Clayton or Sherman Anti-trust laws—is it so anxious at this time to apparently divest itself of its Stearns connection?"

To this court it is a practical admission that Besser not only has a monopoly, but knows that it has one and is seeking to superficially cleanse itself of all taint of monopoly while retaining all its benefits.

A Good Monopoly

May we not further examine what effect Besser's combination has had on the price of blocks—not on block making machines—but on the blocks themselves? Here the court was again surprised to learn that blocks cost practically the same now as they did 15 years ago—about 16 or 17 cents each. At first blush therefore it appears that this is a "good monopoly."

Admittedly Besser personally has profited and Besser personally has done much for this industry, but the price of blocks today compared to 15 years ago is due—for one reason—to the tough fiber of the competition, although limited, that refused to give up and second because the present Besser machines can make over 6000 blocks per day as against 3600, 15 years ago. But then there is no assurance that this will continue to be a so-called good monopoly. Besser management may possibly change. Even under Besser the pressure on competitors has risen considerably in the last three years. If this continues for the next three years in the same ratio it can hardly be expected to be hailed as a good monopoly under any reasoning. Furthermore, it might lower its lease agreement terms tomorrow and those who use Besser machines can sell blocks at less. Then what happens to the little competitors is what happens in every price war—they finally "fold their tents" like the Arabs.

But it is now generally recognized that no trust or monopoly obtained by illegal means should be permitted to exist whether it is good or bad. See

U. S. v. Crescent Amusement Co., 323 U. S. 173, 187, 188;
U. S. v. Griffith, supra, 107; and
American Tobacco Co. v. U. S., supra, 811.

The statute does not differentiate. As stated in U. S. v. Aluminum Co. of America, supra, 527:

> "Be that as it may, that was not the way that Congress chose; it did not condone 'good trusts' and condemn 'bad' ones; it forbade all."

Conclusion

We conclude that the defendants, Besser, Stearns, Andrus and Gelbman have combined and conspired to restrain and to monopolize interstate trade and commerce in concrete block machines in violation of Sections 1 and 2 of the Sherman Act, and that Besser Manufacturing Co. and Jesse H. Besser have attempted to monopolize and have monopolized said trade and commerce in violation of Section 2 of the Act.

We hold, therefore, that this court must bring Besser's activities within the restrictions of the Sherman Act by the following steps:

First, that the Besser interest must dispose of its holdings in the Stearns Manufacturing Company, Inc.;

Second, that the Gelbman-Andrus patents listed in the December 7, 1942 agreement, plus all improvements and inventions made subsequently and which come within the terms of said agreement, be made available to everyone in the industry on the same terms;

Third, that all lessees of Besser machines may at their option withdraw as a party to such leases providing said option is exercised by July 1, 1951, Besser to notify each lessee of his right of withdrawal; and

Fourth, that each of the parties to that December 7, 1942 contract be and is hereby enjoined from entering into a like agreement with each other or any other person, corporation or combination.

Since defendants now claim that they want to dispose of their Stearns interest and since Besser, according to defendants' brief page 28, is willing to remove all restrictions on use of the Gelbman-Andrus patents, the order of this court should not impose any great hardship except that there must be no conditions attached to disposal of the Stearns stock. When this is done, sanctioned by the approval of this court, the purposes of this action will have been accomplished.

(S.) FRANK A. PICARD,
United States District Judge.

Dated: January 30, 1951.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

Civil Action No. 8144

UNITED STATES OF AMERICA, *Plaintiff*,

vs.

BESSER MANUFACTURING COMPANY, STEARNS MANUFACTURING COMPANY, INC., JESSE H. BESSER, LOUIS GELBMAN and HAMLIN F. ANDRUS, *Defendants*

FINAL JUDGMENT

Plaintiff, United States of America, filed its complaint herein on April 28, 1949, and defendants answered denying the substantive allegations thereof. The cause came on for trial May 16, 1950, and was completed June 23, 1950. The court filed its opinion January 30, 1951, finding that the defendants have violated Sections 1 and 2 of the Sherman Act. The court hereby adopts said opinion as its findings of facts and conclusions of law.

Now, therefore, it is hereby ordered, adjudged and decreed as follows:

I

Defendants Besser Manufacturing Company, Stearns Manufacturing Company, Inc., Louis Gelbman, Hamlin F. Andrus and Jesse H. Besser have combined and conspired to unreasonably restrain, and to monopolize, trade and commerce in concrete block making machines in violation of Sections 1 and 2 of the Sherman Act; and defendants Besser Manufacturing Company and Jesse H. Besser have attempted to monopolize and have monopolized said trade and commerce in violation of Section 2 of the Sherman Act.

II

As used in this final judgment:

(A.) "Besser Company" means Besser Manufacturing Company;

(B.) "Stearns" means Stearns Manufacturing Company, Inc.;

(C.) "Besser" means Jesse H. Besser;

(D.) "Gelbman" means Louis Gelbman;

(E.) "Andrus" means Hamlin F. Andrus;

(F.) "Patents" means United States Letters Patent and applications therefor, and all reissues, divisions, continuations of extensions thereof, and patents issued upon said applications;

(G.) "Person" means any individual, partnership, firm, corporation, association, trustee or any other business or legal entity.

III

The provisions of this final judgment applicable to any defendant shall apply to such defendant, its subsidiaries, successors, assigns, and each of its officers, directors, agents, employees and any other person acting under, through or for such defendant.

IV

(A) Within sixty (60) days following the entry of this final judgment, defendants Besser Company and Besser shall present to this court for approval their plan for divesting themselves, by July 1, 1951, of all stock holdings and other interests, direct or indirect, in defendant Stearns.

(B) Defendants Besser Company and Besser are hereby ordered and directed to cancel and terminate any and all contracts, agreements and understandings between said defendants or either of them, and any other person, calling for the disposition of any of the capital stock of defendant Stearns, where such contracts, agreements or understandings were entered into prior to entry of this final judgment. Defendants Besser Company and Besser are hereby enjoined and restrained from adhering to, enforcing or

claiming any rights under any of the aforesaid contracts, agreements or understandings.

V

Defendants Besser Company and Besser are each enjoined and restrained from

(A) Acquiring, directly or indirectly by purchase, merger, consolidation or otherwise after entry of this final judgment, and from holding or exercising after such acquisition ownership or control of, the business, physical assets or good will, or any part thereof, or any capital stock or securities of any person engaged in the manufacture, sale or distribution of concrete block making machines until after said defendant has, upon reasonable notice to the Attorney General and an opportunity on the part of the latter to be heard, shown to this court that such acquisition would not substantially lessen competition in the manufacture, sale or distribution of concrete block making machines;

(B) Causing, authorizing or knowingly permitting any officer, director, agent or employee to serve as an officer, director, agent or employee of any other person engaged in the manufacture of concrete block making machines.

VI

(A) The license agreement to which defendants Gelbman, Andrus, Stearns and Besser Company are parties, dated December 7, 1942, is adjudged to be unlawful under Sections 1 and 2 of the Sherman Act and is hereby declared null and void.

(B) Defendants are jointly and severally enjoined and restrained from conveying or receiving any patent rights under any license, contract, agreement or understanding which gives the licensee or licensees control over the number of licenses issued or to be issued, or which has the same unlawful purpose and effect as the afore-described license agreement of December 7, 1942.

(C) Except for now pending actions, appeals and proceedings pursuant thereto in *Andrus and Gelbman v. Whit-*

man; Andrus and Gelbman v. *Wenzel, et al; Besser Manufacturing Company* v. *Whitman;* defendants Besser Company, Besser, Gelbman and Andrus are enjoined and restrained from instituting or threatening to institute, or maintaining or continuing any action, suit or proceeding for acts of infringement of any patent referred to in Section VII (A) of this judgment occurring prior to the date of this judgment.

VII

(A) Defendants Gelbman, Andrus, Besser Company and Besser are each ordered and directed to grant to any applicant therefor a non-exclusive license to make, use and vend concrete block making machinery under any, some or all patents and patent applications pertaining to concrete block making machinery now owned or controlled by the defendant, or which are issued or applied for within ten years from the entry of this final judgment, and each of said defendants is hereby enjoined and restrained from making any sale or other disposition of any of said patents or patent applications which deprives it of the power of authority to grant such licenses, unless it sells, transfers or assigns such patents and patent applications and requires as a condition of such sale, transfer or assignment that the purchaser, transferee or assignee shall observe the requirements of this Section VII, and the purchaser, transferee or assignee shall file with this court prior to consummation of said transaction, an undertaking to be bound by the provisions of this Section VII. The reference to an "Undertaking" shall not be construed as requiring the posting of a bond.

(B) Defendants Gelbman, Andrus, Besser Company and Besser are hereby enjoined and restrained from including any restrictions or condition whatsoever in any license or sublicense granted by or pursuant to the provisions of this Section VII and in order to arrive at a fair royalty price for the use of the various patents, present and future, as above enumerated, and the form and contents of the royalty contracts—

1. Said plaintiff government and said defendants Gelbman and Andrus, shall on or before April 21, 1951, each

select two persons, which said four persons so selected shall act as a committee to determine such fair royalty prices and the form and contents of the royalty contracts; provided, however, that if they are unable to so agree on or before May 5, 1951, then said four persons so selected may then select and against a fifth person to act with them as the fifth member of said committee; and provided further that if said four are unable to agree upon the fifth member by at least a three to one vote, on or before May 12, 1951, then such questions and points not agreed upon shall forthwith be referred to this court which shall then have the right to act as the fifth member himself or select another person in his stead to aid in making the final decision; and

2. It is further ordered that the same method and manner shall be used in arriving at a fair royalty price and the form and contents of the royalty contracts covering the patents, present and future, as above enumerated, owned and/or controlled by defendants Besser Manufacturing Company and Jesse H. Besser and when arrived at shall be filed as provided in sub-paragraph (C) following.

(C) It is further ordered that said final royalty price together with the form and contents of the royalty agreement, when determined, shall be forthwith filed by the government with the United States District Court Clerk and upon so filing will then become a part of this judgment just as though it were now included herein.

(D) Nothing herein shall prevent any applicant from attacking in the aforesaid proceedings, the validity or scope of any of the patents, nor shall this final judgment be construed as importing any validity or value to any of the said patents.

VIII

(A) Defendant Besser Company is hereby ordered and directed, within thirty (30) days from the entry of this final judgment to notify each person presently leasing a concrete block making machine from said defendant that the lessee may, at its option,

(1) terminate the said lease agreement at any time prior to January 1, 1953, or

(2) continue under the terms of the lease, or

(3) enter into an agreement to purchase the machine or machines leased, and the accessory equipment used, as mutually satisfactory to the parties concerned;

provided, however, that the provisions of sub-sections 1 and 2 of this sub-paragraph (A) shall be contingent upon said lessee making his election in writing on or before October 1, 1952.

(B) Defendant Besser Company is hereby ordered and directed to sell to any existing lessee or purchaser under this Section VIII, of concrete block making machinery and accessory equipment of said defendant repair parts upon reasonable, uniform and non-discriminatory prices, terms and conditions of sale.

IX

Defendants are jointly and severally enjoined and restrained from entering into, adhering to or claiming any rights under any contract, agreement or understanding with any person presently or hereinafter engaged in the development or manufacture of concrete block making machinery which has the purpose or effect of preventing such person, or any other person from competing with defendants or any of them in the development, manufacture or sale of concrete block making machinery.

X

Each of the defendants is enjoined and restrained from compelling, coercing or influencing any person to refrain from manufacturing concrete block making machinery or supplying steel or other materials, used in the manufacture of said machines, to any manufacturer of such machines.

XI

For the purpose of securing compliance with this final judgment duly authorized representatives of the Department of Justice shall, upon written request of the Attorney General, or an Assistant Attorney General, and on reasonable notice to the defendant, made to its principal office, be permitted (1) access during the office hours of said defendant to all books, ledgers, accounts, correspondence, memo-

randa and other records and documents in the possession or under the control of said defendant relating to any matters contained in this final judgment, and (2) subject to the reasonable convenience of said defendant and without restraint or interference from it, to interview officers or employees of said defendants, who may have counsel present, regarding any such matters. No information obtained by the means provided in this paragraph shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of such Department, except in the course of legal proceedings in which the United States is a party for the purpose of securing compliance with this judgment, or as otherwise required by law.

XII

Jurisdiction is retained for the purpose of enabling any of the parties to this judgment to apply to the court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this judgment, or the modification thereof, or the enforcement of compliance therewith and for punishment or violation thereof.

XIII

Judgment is entered against the defendants for all taxable costs to be taxed in this proceeding.

FRANK A. PICARD,
United States District Judge.

Dated: April 12, 1951.